Office - Supreme Court, U. S.
FILED
FEB 24 1914
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 725

NORTHWESTERN OIL COMPANY,

Petitioner,

vs.

SOCONY-VACUUM OIL COMPANY, INC., ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

W. P. CRAWFORD,
Superior, Wisconsin,
Attorney for Petitioner.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

INDEX.

	Page
Petition for Writ of Certiorari	1
Jurisdiction	2
Questions Presented	2-3
Statutes Involved	3
Statement	4-7
Reasons for Granting the Writ	8-10
Brief of Argument	12-27
Conclusion	27
Appendix	28

CITATIONS

CASES:

Adams vs. Mills, 286 U. S. 397, 76 L. Ed. 1184 ..... 14, 16

Chattanooga Foundry & Pipe Works vs. City of Atlanta, 203 U. S. 390 ..... 14, 16

Davis vs. Portland Seed Co., 264 U. S. 403 15

Farmers Co-op Oil Co. vs. Socony-Vacuum Oil Co., Inc., et al., 133 F. (2d) 101 17

Leonard vs. Socony-Vacuum Oil Co., et al., 42 F. Supp. 369 ..... 9, 10, 17, 26

Miller Oil Co. vs. Socony-Vacuum Oil Co., et al., 37 F. Supp. 831 .. 17

N. Y., N. H. & H. R. Co. vs. Ballou & Wright, 242 F. 862 14

Pennsylvania R. R. Co. vs. International Coal Mining Co., 230 U. S. 184 15

Southern Pacific vs. Darnell-Taenzer Co., 245 U. S. 531 ..... 14, 15

Straus vs. Victor Talking Machine Co., 297 Fed. 791 ..... 3, 8, 9, 12, 17, 23-25, 26, 27

Twin Ports Oil Co. vs. Pure Oil Co., 119 F. (2d) 747 17

United States vs. Socony-Vacuum Oil Co., Inc., et al., 310 U. S. 150, 84 L. Ed. 1129, 23 F. Supp. 937, 105 F. (2d) 899 ..... 5, 6, 12, 19, 21, 22, 26

Weeks vs. Bareco Oil Co., 125 F. (2d) 84 17

STATUTES:

Clayton Act (Act of Oct. 15, 1914), Tit. 15 U. S. C. A. Section 15 ..... 1, 2, 3, 6, 16

Interstate Commerce Act, 49 U. S. C. A.
Section 1 (5) 10, 15
Section 8 10

Sherman Antitrust Act, Tit. 15 U. S. C. A.
Section 1 ..... 1, 2, 3, 6, 10, 13, 22

Rule 12 (h), Rules of Civil Procedure 3

IN THE

Supreme Court of the United States

NO.....

NORTHWESTERN OIL COMPANY,

Petitioner,

vs.

SOCONY-VACUUM OIL COMPANY, INC., CONTINENTAL OIL COMPANY, THE PURE OIL COMPANY, SHELL OIL COMPANY, INC., SINCLAIR REFINING COMPANY, MID-CONTINENT PETROLEUM CORPORATION, AND PHILLIPS PETROLEUM COMPANY,

Respondents.

To the Honorable Supreme Court of the United States:

The PETITION of the NORTHWESTERN OIL COMPANY respectfully shows to this Honorable Court as follows:

This is a petition for a writ of certiorari to review a final decision of the Circuit Court of Appeals for the Seventh Circuit, rendered December 7, 1943, 138 F. (2d) 967, affirming a judgment of the District Court for the Western District of Wisconsin, entered May 4, 1943, in favor of Respondents upon a directed verdict, in an action in which Petitioner seeks to recover from Respondents losses it sustained as a jobber in gasoline, from whom Respondents, by means of a conspiracy in violation of the Antitrust Act (Sec. 1, Title 15, U. S. C. A.), exacted large sums of money in unlawfully increased prices of gasoline.

JURISDICTION

Jurisdiction was invoked on the ground that the suit arose under the provisions of the Antitrust Act (The Act of July 2, 1890, c. 674, 26 Stats. 209, U. S. C. A., Title 15, Section 1, known as the SHERMAN ANTITRUST ACT), and The Clayton Act (The Act of October 15, 1914, 38 Stats. 730, Title 15, U. S. C. A., Section 15).

QUESTIONS PRESENTED

1. Where Respondents, by means of a conspiracy in violation of the Antitrust Laws, have raised and fixed the price of gasoline which Petitioner as a jobber was compelled to and did pay, is Petitioner entitled to recover as damages the unlawful excess? The Circuit Court of Appeals held it was not. Petitioner contended that such ruling was error.

   a. Is it a defense to Petitioner's right to recover that in the price it received on the sale of said gasoline at retail said excess in cost was included, where such selling price was also fixed by the conspiracy? The Circuit Court held that it was. Petitioner contends that such ruling was error.

2. The conspiracy having, for a period of two years, increased and fixed jobber's cost of gasoline, and having at the same time increased and fixed his selling price in the same amount, so that the margin between cost and selling price remained fixed, has the jobber been injured so that damages may be recovered under the Clayton Act?

3. Does the decision in the case at bar create a conflict of decisions in the Circuit Court of Appeals in that it is opposed to the decision of the Circuit Court of Appeals of the Second Circuit, in *Straus vs. Victor Talking Machine Co.*, 297 Fed. 791, in which that Court held that plaintiff

there was entitled to recover the difference between the amount he paid for merchandise as raised and fixed by a conspiracy in violation of the Antitrust Act and what he would have paid but for the conspiracy, regardless of whether he recover the excess and made a profit in such sales or not? The District Court in the case at bar held that it did not and the Circuit Court affirmed. Petitioner contends that such ruling was error.

4. Where it is conceded by Respondents that someone is entitled to recover the unlawful excess cost of gasoline caused by the conspiracy, and Respondents have not objected that Petitioner is not the real party in interest as required by Rule 12 (h), Rules of Civil Procedure, has not such objection been waived?

5. The fact of damage having been shown in some amount it was error to have declared as a matter of law that no verdict could be returned in favor of Petitioner.

(NOTE: In any event Petitioner was deprived of the use of the money illegally exacted between the time of its exaction and the time it was recovered, even though, according to Respondents' theory it was recovered.)

STATUTES INVOLVED

The ACT of JULY 2, 1890, c. 674, 26 Stats. 209 (U. S. C. A., Title 15, Section 1), known as the SHERMAN ANTI-TRUST ACT.

The ACT of OCTOBER 15, 1914, 38 Stats. 730 (Title 15, U. S. C. A., Section 15), known as the CLAYTON ACT.[1]

---

[1] "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws *shall be prima facie evidence* against such defendant in any suit or proceeding brought by any other party against such defendant under said laws *as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto;* Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken." (Italics supplied.)

STATEMENT

Respondents organized and carried on through 1935 and 1936, a conspiracy in violation of the Antitrust Act by means of which the tank car spot market price of gasoline sold to Petitioner and other jobbers in the Mid-Western area[2] was raised and fixed.

Practically all of the gasoline sold on the spot market is sold by independent refiners to independent jobbers and that constitutes only from 5% to 7% of all gasoline sold in the Mid-Western area. It therefore appears that the price at which the Major Oil Companies sold the greater part of their gasoline in the Mid-Western area was directly controlled by spot market sales by independent refiners of less than 7½% of all the gasoline sold in the ten-state area.

The conspiracy was organized at a series of secret meetings held by Major Oil Company officers, including Respondents, during the first two months of 1935, at which a Committee was appointed to adopt a continuous buying program of distress gasoline[3] from independent refiners at gradually increasing prices which became the prices that jobbers by virtue of their supply contracts were compelled to pay for gasoline.

When the conspiracy went into effect on March 7, 1935, the tank car spot market price to jobbers was .04⅜¢ per gallon (regular grade gasoline). Immediately reacting to the operation of the conspiracy, this price was advanced at

---

[2]The Mid-Western area, known in the Oil Industry, is composed of the 10 states of North Dakota, South Dakota, Minnesota, Iowa, Missouri, Kansas, Illinois, Wisconsin, Michigan and Indiana. Over 21% of all gasoline sold in the United States in 1935 was sold in those states amounting to almost 5,000,000,000 gallons, and over 25%, amounting to nearly 5,500,000,000 gallons sold in 1936.

[3]Distress or surplus gasoline was known in the industry as gasoline for which independent refiners could not find buyers at going prices and therefore were selling it on the market for whatever price they could get and below the going market price.

Independent jobbers are those who do not buy gasoline under contracts.

intervals of about two weeks at 1/8¢ to 1/4¢ through 1935 and 1936, so that on June 14, 1935, the price had advanced 1 1/4¢ and continued its said advance through 1936[4] (R. 1065-67; Exhs. 22-23). Never again during 1935 or 1936 did the price return to .043/8¢. The control of the market by the conspiracy left no other proof possible than that the spot market price after March 7th would have been .043/8¢ per gallon as it was then. Petitioner claims damages for the amount over .043/8¢, illegally collected from it.[5]

Petitioner and other jobbers were supplied with gasoline for the most part by Major Oil Companies in tank car lots under contracts which uniformly provided that the base price to be paid by the jobber should be the spot market price published in the trade journals. Respondents sold most of their gasoline in 1935 and 1936 to jobbers (*U. S. vs. Socony-Vacuum*, 84 L. Ed. 1129), and the balance to consumers through their owned or leased service stations. Petitioner's supply was with Tidewater Oil Sales Corporation[6] (R. 236, 242), through Barber Company, its exclusive sales agent, which provided that the base price should be the

[4]There were 7 advances in the prices of both regular and third-grade gasoline during the period from March 7, 1935, when the Mid-Continent program started operation, and June, 1935, when prices finally leveled off. During this period the mechanical subcommittee recommended from 5 to 8 advances in the purchasing prices. The committee, as we have seen, made no further recommendations after June 1, 1936, because, as McDowell, one of the convicted Respondents testified, the contacts had been made and it was one of those things that just carried on. Market prices remained rigid from June through December. (*U. S. vs. Socony-Vacuum*, 84 L. Ed. 1129.)

[5]To illustrate the immediate effect of the conspiracy on the spot market, the following appears in the Record, 1063-67; Exhs. 22-23:

Prices—1935:

2/18 to 3/8.....04375	3/30 04875	5/18 05375
No change.	4/6 05	5/25 055
3/9 045	4/17 05125	6/6 05625
3/13 04625	4/22 0525	6/14 to 12/31...05625
3/18 0475		

[6]The Indictment against Tidewater was dismissed by the trial court on a technical ground. In 1935, Petitioner purchased 6,350,297 gallons of gasoline with which to carry on its business as a jobber, and an amount equal to approximately 2% thereof, which was not resold but used in operating its motor vehicles, and lost through shrinkage, shortages, etc., and in 1936, 7,291,805 gallons; the illegal increase in the price of gasoline caused by the conspiracy resulted in Petitioner's having paid in those two years the sum of $156,308 more than it otherwise would have paid (R. 1301, Exh. 165).

low of tank car spot market prices published in the Chicago Journal of Commerce.

The Respondents, with five other Major Oil Companies, and five of their officials or agents, were indicted and convicted in the District Court of the United States for the Western District of Wisconsin for violating the Antitrust Act, by means of the conspiracy, as stated above (*U. S. vs. Socony-Vacuum Oil Co., et al.*, 23 F. Supp. 937). This judgment of conviction was affirmed by this Court May 6, 1940 (*U. S. vs. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 84 L. Ed. 1129).[7] The present action was commenced November 8, 1940. As a complete, detailed statement of the facts relative to the organization of the conspiracy and its operation appears in the opinion of this Court in *U. S. vs. Socony-Vacuum*, and also appears in the opinion of the Circuit Court of Appeals, 105 F. (2d) 899, on appeal by defendants, further detailed statement of the facts in that regard is omitted here.

No testimony was offered to oppose or overcome the *prima facie* case established by the Clayton Act, *supra*. Likewise, it was established without dispute upon the trial that Peti-

---

[7]The Indictment charged:

"Beginning in the month of February, 1935, and continuing to the date of the presentation of this indictment, defendants and certain persons hereinafter referred to, and other persons to the grand jurors unknown, well knowing all the foregoing facts, have combined and conspired together for the purpose of artificially raising and fixing the tank car prices of gasoline in the aforementioned spot markets, and, as intended by them, defendants have artificially raised and fixed said spot market tank car prices of gasoline and have maintained said prices at artificially high and non-competitive levels, and at levels agreed upon among them, and have thereby intentionally increased and fixed the tank car prices of gasoline contracted to be sold and sold in Interstate Commerce as aforesaid in the Mid-Western area (including the Western District of Wisconsin), and have arbitrarily, by reason of the provisions of the prevailing form of jobber contracts above described in paragraph 11, exacted large sums of money from thousands of jobbers with whom they have had such contracts in said Mid-Western area (including the Western District of Wisconsin), and in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area (including the Western District of Wisconsin). In so doing, defendants have then and there engaged in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline among the several states of the United States in violation of Section 1 of the Act of Congress of July 2, 1890, known as the Sherman Antitrust Act."

tioner purchased at the unlawful price, during 1935 and 1936, 13,642,102 gallons of gasoline and paid therefor $156,308, after giving credit for all price deductions granted by its supplier, more than it would have paid but for the conspiracy. Petitioner contends that the transaction between Petitioner and defendants—the conspirators, ended there, it was completed and a cause of action then and there arose against Respondents for having illegally, through violation of the Antitrust Act, exacted 1¼¢ to 1½¢ per gallon from Petitioner on the quantity purchased, regardless of anything that occurred thereafter. Petitioner purchased gasoline in 10 or 20 tank car lots, each containing about 8,000 gallons. The movement of the cars was not continuous from the Major Company to the jobber and from the jobber to its customer, on the contrary, the gasoline was transferred to the jobber's bulk storage plants and at a later time shipped to filling stations in tanks and trucks and there sold at the posted service station price of the market leader (Standard of Indiana); about 2% of the gasoline purchased was used in its own motor truck operations by Petitioner.

The Circuit Court of Appeals, erroneously affirming the District Court, held that all future transactions by Petitioner in the sale or other disposition of the gasoline on which the excess, illegal price was paid, should be probed to determine whether or not some or all of the loss was at some later, unknown time, recovered by Petitioner in its bargaining for the sale of the commodity at retail with an independent third party.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals erred:

1. In sustaining the ruling of the trial court that Petitioner could not recover any part of the illegal excess cost of gasoline exacted through a conspiracy in violation of the Antitrust Act, unless it first proved that such excess was not recovered by it in subsequent sales thereof.

2. In holding that proof that Respondents by means of a conspiracy in violation of the Antitrust Act compelled Petitioner to pay a price for gasoline which the conspiracy had raised and fixed had caused Petitioner no damage.

3. In holding that Petitioner was not damaged in its business or property through a conspiracy in violation of the Antitrust Act which fixed and maintained the margin between its buying cost and selling price of gasoline. The margin so fixed being at such an amount as left no operating profit.[8] The evidence shows that the tank car market before the conspiracy was a free and competitive market, for the spot market price required by contract to be paid by the jobber was determined by the price paid in spot sales from day to day by independent jobbers to independent refiners. The tank wagon (jobber's selling price) market was also free and competitive before the conspiracy; during the conspiracy both markets were fixed and controlled by the conspiracy.

4. In sustaining trial court's decision that the rule as to damages applied in *Straus vs. Victor Talking Machine Co.*, 297 Fed. 791, was not applicable.

5. In directing a verdict for Respondents and entering

[8]Petitioner, for more than 20 years, has been engaged in the business of buying, selling and distributing petroleum products in Northern Wisconsin and Minnesota; in 1935 and 1936 it owned and maintained about 30 bulk storage plants and a large fleet of tank trucks and other motor vehicles. It had an investment of about one million dollars in the business.

judgment thereon on ground that Petitioner sustained no damage.

6. In holding that:

> "The essence of the charge was illegal fixing of increased retail prices of gasoline by defendants by raising tank car prices and thereby, in turn, eventually, retail prices. Upon that conviction plaintiff relied as a basis for recovery in this cause."
>
> 138 F. (2d) 970.

7. In holding that the consumer and not Petitioner was the real party in interest, although Respondents effectively waived that defense.

8. The decision of the Circuit Court of Appeals in the case at bar creates a conflict of decisions in the Federal Court in that it is opposed to the decision of the Circuit Court of Appeals for the Second Circuit rendered February 4, 1924, in the action of *Straus vs. Victor Talking Machine Co.*, reported in 297 Fed. 791, and of the District Court of the Southern District of New York.

9. The Circuit Court erroneously affirmed the erroneous ruling of the District Court in the case at bar:

> "That the allegation by plaintiff that he paid a higher purchase price as a result of an illegal conspiracy, without an allegation that its selling price was not increased, is insufficient to state a claim which entitled it to relief.
>
> "The burden is on the jobber to allege and prove the facts with respect to its selling price as well as its buying price,"

such ruling having been made by the same District Court in *Leonard vs. Socony-Vacuum Oil Co., Inc.*, 42 F. Supp. 369, and applied to the case at bar. No authority in support of this decision is cited, none exists.[9]

---

[9]The court said that the Interstate Commerce Act cases were inapplicable because that Statute (49 U. S. C. A., Sec. 1, *et seq.*) was

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated a full and complete transcript of the record and all proceedings of said Court of Appeals in this case, which was entitled in that Court "*Northwestern Oil Company, Plaintiff-Appellant, vs. Socony-Vacuum Oil Company, Inc., et al., Defendants-Appellees.*" to the end that said cause may be reviewed and determined by this Court as provided by law, and that your Petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate; and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

NORTHWESTERN OIL COMPANY,
By J. E. SMITH, *Treasurer*,
Petitioner.

W. P. CRAWFORD,
Attorney for Petitioner.

"a fundamentally different enactment from the Clayton Antitrust Act. 38 Stats. 730. The Interstate Commerce Act insures recovery for departure from the published tariffs. In those cases the illegal, unreasonable, excess charge is definitely and specifically found by the Commission in its order, and its repayment to the one who has suffered the loss by such overpayment is fixed," (*Leonard vs. Socony-Vacuum Oil Co.*, 42 F. Supp. 369), but as to damages the Interstate Commerce Act does not:

"*insure* a recovery for departure from the published tariffs."

The Interstate Commerce Act, 49 U. S. C. A., Sec. 1 (5), provides that all transportation charges

"shall be just and reasonable and every unjust and unreasonable charge for such service, or any part thereof is prohibited and declared to be *unlawful*,"

and the Interstate Commerce Act, Sec. 8, provides that:

"such common carrier shall be liable to the person or persons injured thereby for the *full amount of damages* sustained in consequence of any such violation of the provisions of this chapter,"

and the Antitrust Act provides:

"Any person who shall be injured in his business or property may sue and recover *three*-fold the damages sustained."

STATE OF WISCONSIN,

ss.

COUNTY OF DOUGLAS.

J. E. SMITH, being first duly sworn, on oath says that he is an officer, to-wit: Treasurer of the Northwestern Oil Company, Petitioner above named; that he has read the above and foregoing Petition and the facts therein stated are true as he believes.

J. E. SMITH.

Subscribed and sworn to before me this 14th day of February, 1944.

FLORENCE STAUPE,
Notary Public,
Douglas County, Wis.

My commission expires July 14, 1946.

STATE OF WISCONSIN,

ss.

COUNTY OF DOUGLAS.

W. P. CRAWFORD, being first duly sworn, on oath says that he is the attorney for Northwestern Oil Company, Petitioner above named; that he has read the foregoing Petition, and that the facts therein stated are true as he believes.

W. P. CRAWFORD.

Subscribed and sworn to before me this 14th day of Febru ary, 1944.

FLORENCE STAUPE,
Notary Public,
Douglas County, Wis.

My commission expires July 14, 1946.

BRIEF OF ARGUMENT

I.

This case presents questions of importance in the general administration and enforcement of the Clayton Act provision of the Antitrust laws, which have not as yet been decided by this Court. In *United States vs. Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150, 84 L. Ed. 1129, this Court affirmed the conviction of Respondents for having raised and fixed prices of gasoline paid by jobbers by means of a conspiracy in violation of the Antitrust Act. Petitioner and other jobbers in the Mid-Western area sustained damage by reason of having been compelled to pay such illegally increased prices for gasoline; but the Circuit Court of Appeals in the case at bar, affirming a decision of the District Court, held that no damage was caused Petitioner by said conspiracy.

Petitioner contends that such decision is erroneous. The statute of limitations will have run against a large number of claims by jobbers before any other case than this can be presented to this Court for decision, even though an Act of Congress, passed October 10, 1942, suspends the statute of limitations in this class of cases to June 30, 1945, unless an earlier date is fixed by law. The Circuit Court of Appeals for the Second Circuit has held in *Straus vs. Victor Talking Machine Co.*, 297 Fed. 791, in a case not distinguishable from the case at bar, that where a dealer in merchandise has paid therefor a price which was increased by force of a conspiracy, he is entitled to recover the difference between the price paid and the price that would have been paid but for the conspiracy, regardless of whether such increase was passed on or recovered back by the dealer in his sales to his customers.

The decision of the Circuit Court of Appeals in the case

at bar is in direct conflict with the Circuit Court of Appeals for the Second Circuit in the Straus case.

II.

Petitioner was not obliged under its contract with its supplier to sell the gasoline at any particular price or time or to sell it at all. When it bought this gasoline it became the owner thereof with the right to dispose of it as it might choose. The conspiracy deprived Petitioner of the right to buy or sell gasoline except at prices fixed by the conspiracy. Gasoline was bought by Petitioner at intervals of 10 to 30 days on orders of 10 to 30 cars each, each car holding about 8,000 gallons. When, on any of these purchases, there was illegally exacted, through a violation of the Antitrust Act, an increase in the price, Petitioner then and there had a cause of action to recover back such increase. It might sue therefor the next day or at any time later, within the statute of limitations.

Petitioner contends that when he did sue he was entitled to recover back the illegal excess paid. Upon what theory it can be held that the jobber was obliged to sell gasoline on which he paid the illegal price and account to Respondents for what he received therefor is difficult to understand. Reference by the Circuit Court to the fact that the jobber is a middleman does not affect his right to the protection of the Antitrust Act whose violation exacts an unlawful price from him; he was not selling gasoline on commission; in fact, about 2% of this gas was not sold but used in Petitioner's own motor vehicles.

In the class of cases under the Interstate Commerce Act, in which a carrier illegaly exacted from the shipper a freight rate higher than that fixed by the Interstate Commerce Commission and where the shipper received back such illegal amount by adding it to the price he received from his

customers to whom he disposed of the commodity, this Court held that the shipper was entitled to recover from the carrier the excess even though such illegal excess was passed on to its purchasers.

Southern Pacific vs. Darnell-Taenzer Co., 245 U. S. 531, 533;[10]

Adams vs. Mills, 286 U. S. 397, 76 L. Ed. 1184;[11]

Chattanooga Foundry & Pipe Works vs. City of Atlanta, 203 U. S. 390;

N. Y., N. H. & H. R. Co. vs. Ballou & Wright, 242 F. 862.

The Circuit Court erroneously held such cases inapplicable here.

Respondents claim that the consumer paid the loss and that he alone may recover but the consumer was not in relation or privity with the conspiracy or the conspirators, the jobber was, as it was from the jobber that Respondents took

---

[10]"The general tendency of the law, in regard to damages, at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. * * *

"The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. *New York, New Haven & Hartford R. R. Co. vs. Ballou & Wright*, 242 Fed. Rep. 862. Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. 13 I. C. C. 680. Probably in the end the public pays the damages in most cases of compensated torts."

[11]"Neither the fact of subsequent reimbursement by the plaintiffs from funds of the shippers, nor the disposition which may hereafter be made of the damages recovered, is of any concern to the wrongdoers. This proceeding does not involve a controversy between the consignors and the consignees; and the carriers cannot be allowed to import one into it. * * *

"The plaintiffs have suffered injury within the meaning of Section 8 of the Interstate Commerce Act; and the purpose of that section would be defeated if the tortfeasors were permitted to escape reparation by a plea that the ultimate incidence of the injury was not upon those who were compelled in the first instance to pay the unlawful charge. * * *

"In contemplation of law the claim for damages arose at the time the extra charge was paid."

This principle would restore to Petitioner the money wrongfully taken from it. But Respondents so-called principle of the Criminal Case that the jobber passed on the illegal price, which it contends allows it to retain its illegal profit because everyone knows that the consumer cannot recover.

the money. Petitioner was in privity with the conspiracy in buying his gasoline at conspiracy prices. The right of the consumer, consisting in the case at bar of many millions of car owners having small claims of a few cents to a few dollars each, to pursue the tortuous course of litigation resulting from each of such transactions, would be a barren one.

In the decision of the Circuit Court of Appeals, it is said that the case at bar is more nearly within the decisions under the Interstate Commerce Act, such as *Pennsylvania R. R. Co. vs. International Coal Mining Co.*, 230 U. S. 184, and *Davis vs. Portland Seed Company*, 264 U. S. 403, which were actions to recover damages for illegal discrimination in rates where the only proof made was that the plaintiffs paid only the legal rate while another shipper paid less than the legal rate and the plaintiffs claimed as damages, the difference between the legal rate which they paid and the undercharged rate paid by this competitor. Unlike the case at bar, no money was there illegally taken from the shipper; but, Petitioner contends that under the other section of the Interstate Commerce Act considered in cases such as *Southern Pacific vs. Darnell, supra*,[12] where the plaintiff paid an illegal rate exacted of it by the carrier, this Court held that the amount of such illegal exaction was the pecuniary loss and damage of the shipper; the amount necessary to compensate plaintiff for the violation of its legal rights.

The Circuit Court of Appeals said that the Interstate Commerce Act, 49 U. S. C. A., Section 1, insures the shipper a recovery of the illegal excess as an overcharge, while under the Clayton Act damages are recoverable for a tort.

The right to recover for the illegal exaction of freight

---

[12]In the Darnell Case this Court said:

"Certainly these defendants are not entitled to this money, which they have taken from the complainants, and

"Carriers cannot be heard to say that reparation for the exaction of unreasonable freight rates should be denied because the shipper or consignee from whom the same has been collected has on that account secured a higher price for the commodity from his purchaser."

rates under the Interstate Commerce Act is based upon the statute which says that it is *unlawful* for a carrier to collect higher than the established Interstate Commerce Commission rate, therefore that action is one in tort like the Clayton Act is. This Court, in *Adams vs. Mills, supra*, designates the carrier exacting an illegal charge as a *tortfeasor*. It there said:

> "The plaintiffs have suffered injury within the meaning of Section 8 of the Interstate Commerce Act; and the purpose of that section would be defeated if the *tortfeasors* were permitted to escape reparation by a plea that the ultimate incidence of the injury was not upon those who were compelled in the first instance to pay the unlawful charge."

In *Chattanooga Foundry & Pipe Works vs. City of Atlanta*, 203 U. S. 390, Mr. Justice Holmes, writing the opinion of the Court says, regarding damages under the Clayton Act:

> "'*A person whose property is diminished by a payment of money wrongfully induced is injured in his property.*'
>
> * * * * * * * * *
>
> "'*But when a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress, or whatever it may be, and stop there.*'"[13]

---

[13]This Court, in every case where it found that one has illegally by whatever fraud or other violation of law taken the money of another, has ordered the wrongdoer to make restitution by giving the money back to the one from whom it was taken; in the language of Mr. Justice Holmes in the Chattanooga Case,

> "'We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress or whatever it may be and stop there.'"

The Circuit Court erred in failing to give any effect to this principle.

Was Petitioner the sufferer here? Its money was by duress, fraud and violation of the Antitrust law, taken from it, $12,000 (an illegal increase of 1½c per gallon) on every order of 10 cars of gasoline. Was Petitioner injured thereby? The remedy offered by Respondents was that Petitioner was at liberty to sell and recoup his losses. Petitioner then no longer was operating its capital and its organization to make a profit but only to recover its loss, and to this Respondents reply, it is true we have illegally taken and kept his money, but he has not been injured or damaged in his business or property.

The Circuit Court erroneously[14] construed the indictment in the criminal case as follows:

> "The essence of the charge was illegal fixing of increased retail prices of gasoline by defendants by raising tank car prices and thereby in turn eventually retail prices. Upon that conviction plaintiff relied as a basis for recovery in this cause."

---

[14]Similarly the Circuit Court erroneously held that the following cases are authority for its ruling that Petitioner may not recover the increased cost of gasoline paid because it was passed on to the ultimate consumer:

Weeks vs. Bareco Oil Co., 125 F. (2d) 84;
Twin Ports Oil Co. vs. Pure Oil Co., 119 F. (2d) 747;
Leonard vs. Socony-Vacuum Oil Co., 42 F. Supp. 369;
Farmers Co-op. Oil Co. vs. Socony-Vacuum, 133 F. (2d) 101;
Miller Oil Co. vs. Socony-Vacuum, 37 F. Supp. 831.

The *Weeks Case* was one in which Weeks and one other jobber on their own behalf and as representatives of a class of approximately 900 Illinois jobbers sued for damages resulting from the conspiracy of respondents in raising and fixing jobbers' prices of gasoline; the trial court dismissed the action upon the ground that the plaintiffs were too few in number to constitute adequate representation of the 900. The question of whether or not recovery could be had by the jobber who paid the excess price and had passed it on to the consumer was not raised, discussed or decided. Therefore, that decision is no authority to sustain the Circuit Court of Appeals in the case at bar.

The *Twin Ports Oil Case* is one in which plaintiff there sued to recover a loss of margin resulting from the same conspiracy. The case was tried on a stipulation of the parties that as to damage the question of whether plaintiff's margins had been lessened because of the conspiracy was the only question involved; plaintiff's proof showed that there was no loss of margins but on the contrary plaintiff's margins between its cost and selling price remained the same during the period claimed. The decision of the trial court and the Circuit Court was against the plaintiff. Respondents, after the stipulation, contended all the way through, even in this court, opposing Twin Ports Petition for Certiorari, that lessened margins was the only question involved. Anything more than that was said by the Circuit Court for the 8th Circuit, was *pure dictum*. That case is no authority to sustain the judgment of the Circuit Court in the case at bar.

The *Leonard Case* was a decision by the District Court who applied the same ruling to the case at bar and is one of the errors sought to be reviewed here.

The *Farmers Co-op. Oil Company Case* was one in which plaintiff sought to recover damages claimed under the same conspiracy on behalf of itself and its stockholders. The trial court dismissed the action, holding that plaintiff was not the real party in interest and because the damages of the plaintiff and of its stockholders are different.

The *Miller Oil Company Case* was one in which the Miller Oil Company sought to recover damages on the same conspiracy because it paid excess prices, merely alleging that it purchased gasoline at such high prices and was damaged in the sum of $60,000.00, without alleging anything more. The decision of the Circuit Court merely ordered the action dismissed unless the complaint was amended within 10 days. This is no authority for the decision of the Circuit Court in the case at bar.

None of the above mentioned cases deny recovery where an increased price of a commodity is paid by reason of the violation of the Antitrust Act without proving anything more and none of them are in conflict with the decision in the Straus Case.

This is contrary to what the essence of the charge in the indictment was as construed in the criminal case by the Government, by the District Court, by the Circuit Court of Appeals and by this Court. They all held that the essence of the charge in the indictment was the raising and fixing of the tank car spot market prices of gasoline to jobbers, which in turn raised the retail price; this Court held that the charge in the indictment was that the defendants

> "have artificially raised and fixed said spot market tank car prices of gasoline and have maintained said prices at artificially high and non-competitive levels and at levels agreed upon among them and have, thereby intentionally increased and fixed the tank car prices of gasoline contracted to be sold in interstate commerce as aforesaid in the Mid-Western area."

Petitioner Sustained Injury and Damage Under the Clayton Act Because Its Margin Between Its Buying and Selling Price Was Fixed by the Conspiracy, and the Circuit Court Erred in Directing a Verdict for the Respondents.

Based on the evidence, chiefly documentary and not possible of dispute, Respondents, established the fact in the case at bar that Petitioner sustained damages through having his buying and selling price—his margins—fixed by the conspiracy. Respondents claimed upon the trial, and stated in their Brief, page 43, in the Circuit Court of Appeals, in the case at bar, that:

> "In the Madison Oil Case, upon which plaintiff bases this case, the defendants were charged with and convicted of raising the tank car and in turn the retail prices of gasoline. *Thus, under the theory of that case, both plaintiff's buying and selling prices were raised as a result of this conspiracy.*"

That Petitioner was injured and damaged by the conspiracy was therefore shown by Respondents themselves.

The force and effect of this position is that Respondents,

by the conspiracy fixed and maintained for a period of two years the margin of 2¢ or less per gallon, upon which the jobber could do business. This eliminated all competition and freedom of enterprise. Thus, Petitioner sustained injury and damage under the Clayton Act, and the ruling of the Circuit Court to the contrary was error.

Petitioner was denied any opportunity to make a profit in its business. Petitioner could neither buy nor sell on the basis of bargaining, economic conditions, supply and demand, business improvement; large volume of its business, prompt payment of bills, all were taken away by the conspiracy.

Before the conspiracy, the tank wagon market (jobber's selling market) was free, although jobbers selling through service stations to the public were obliged to follow the posted Standard of Indiana prices, they could not sell higher and have any buyers; the Standard price was based upon competition between that and other Major Companies. As contended by Respondents and as stated by this Court, as well as the Court of Appeals in *U. S. vs. Socony-Vacuum*, the tank wagon (jobber's selling price) was also controlled and fixed by the conspiracy. The evidence shows (R. 1268-1269; Exh. 154) that on September 11, 1934, the tank wagon price (Standard of Indiana's posted service station price) dropped 2.2¢ per gallon, cutting the jobber's margin from .03773¢ to .01573¢ per gallon.[15] There was no corresponding decline in the tank car price. A slight increase in the jobber's margins occurred in December, 1934, bringing it to .02198¢; in March, when the buying program went into

---

[15]The Circuit Court of Appeals in *U. S. vs. Socony-Vacuum*, 105 F. (2d) 809, at 835, very properly said:

"The question becomes one as to whether the Standard was a partner in the alleged conspiracy or an adversary engaged in competition. Thus, an important legal question is presented.

"Under the circumstances, however, we need not determine either our authority or the merits of the question for the reason that it has become moot because the case must be reversed upon other grounds."

effect and the two markets became fixed, the margin was set at a fraction below 2¢; however, on June 14th the tank car and tank wagon market became rigid and remained at .02007¢ through the remainder of 1935.

A table of margins during 1935 and 1936 is set out in an Appendix hereto.

The average daily Tank Wagon Jobber's Margin for 1934 was .03171¢

The average daily Tank Wagon Jobber's Margin for 1935 was .02010¢

The average daily Tank Wagon Jobber's Margin for 1936 was .02066¢

Whether the Standard was a partner in the conspiracy or not, Respondents took advantage of and used the Standard's formula for determining its posted tank wagon (retail) price and fixed the tank car (buying) price to conform to the Standard's posted service station price in such a way that the jobber's margin became fixed as it was, as shown in the Appendix.

It appears from the evidence that Petitioner's contract contained a "stop loss" provision (R. 339) to the effect that when the difference between its cost and selling price was less than 5½¢, which means 2¢ to the jobber (3½¢ going to the service station operator), its supplier, recognizing that he was then operating at a loss, would reduce its cost price by the amount that Petitioner's margin was less than 2¢. Respondents now claim that by the conspiracy Respondents intended to and did keep the jobber's margin at 2¢ or less; this as Respondents have shown was accomplished by fixing the jobber's cost and at the same time fixing his selling price. Thus the difference between the jobber's buying and selling price was frozen so that no matter how high the selling price went his buying price went equally high, and therefore as seen by the schedule of prices (R. 1063, Exh. 22), the jobber

was operating at a loss when the conspiracy started operating. In March, 1935, the jobber's margin was .02073¢, and dropped below that to .01782¢ in April, and was .02007¢ on June 14th, remaining at that figure without change until 1936; his margin never increased above that figure during the balance of the year 1935, except with unimportant intervals, nor during 1936, when for most of the time it was less than .02007¢.

Respondents cannot complain that this theory is not now more specifically set out in the pleadings nor insisted upon in the trial. Respondents in opposing Petitioner's claim of damages that it was entitled to recover the amount by which its price had been raised by the conspiracy, assembled the evidence in the record and applying thereto what was said by this Court in the criminal case, *United States vs. Socony-Vacuum Oil Co., Inc., et al., supra*, that both Petitioner's buying and selling prices were raised and fixed by the conspiracy at the same time and amount, therefore Respondents have established the fact of damage to Petitioner leaving only the extent of damage to the jury. The District and Circuit Courts were in error in failing to recognize and give effect to that.

A minor or subsidiary question that Petitioner was *in pari delicto* with the Respondents is referred to by the Circuit Court of Appeals to the effect that the District Court would have been justified in directing a verdict upon that ground.

The District Court indicated that they found it unnecessary to decide that question but did intimate that there was no proof of *pari delicto*. This question not having been decided below doubtless it is not for decision here, since the judgment complained of was rendered on a different ground. This is not the time or place to present analysis, the evidence and applicable decisions.

McDowell, Vice-President of Mid-Continent, testified that

price wars always exist in the industry (R. 181). By December, 1934, price wars had been discontinued.

Podvin's activities with respect to restoring normal prices and eliminating price wars were confined to his own local market area.

Neither the Department of Justice nor any other governmental agency regarded his efforts to suppress price wars in the oil industry, even by concerted action, as a violation of the Sherman Act. In fact, the Government directed Arnott by its Petroleum Administrator Ickes in a letter dated July 20, 1934, to take necessary steps to eliminate price wars. It was only after they were eliminated in December, 1934, and the Respondents stepped outside of that field and in February, 1935, perfected a conspiracy among themselves to buy up surplus gasoline and raise prices that the Government stepped in, resulting in the conviction of Respondents for violating the Sherman Act.

To agree with Respondents' contention regarding *pari delicto* of Petitioner it would have to be concluded that Petitioner knowingly participated in an unlawful scheme which raised its cost of gasoline by $156,308, which it never could recover.

Podvin's activities with reference to restoring prices in areas where price wars existed, were discontinued upon becoming suspicious that Respondents were rigging the market. The conspiracy was not organized until February, 1935.

If it be said that Podvin took part in the conspiracy which raised prices, he did so innocently. He testified (R. 576) that he never heard of the conspiracy until he read of the indictment which was returned in December of 1936.

This Court in *United States vs. Socony-Vacuum Oil Co., Inc., supra,* said:

> *"Market manipulators commonly obtain assistance from the activities of the innocent as well as from those of their allies. The fact that they may capitalize on the*

purchases of others is no more significant than the fact that they may gain direct or collateral benefits from market trends, bullish factors or fortuitous circumstances."

The Decision Sought to Be Reviewed Here Creates a Conflict of Decisions of the Federal Courts in That It Is Opposed to the Decision of the Circuit Court of Appeals of the 2nd Circuit in the Case of Straus vs. Victor Talking Machine Company, 297 Fed. 791.

The Straus case, as reported at page 800, contains a table showing the prices paid by Macy's for Victor goods to be more than the wholesale listed price to distributors. Thus, it shows that Macy's were not paying the full retail prices but by maneuvering around were able to buy Victor goods for less but receiving the retail price on its sales, thus "passing on" and recovering back all of the excess paid and a profit besides. Likewise, a passing on to the jobber's purchasers of the increase in his buying price was held immaterial on the question of damages. So that it cannot be doubted that there is a conflict between the decision in the Straus case in the Second Circuit and that in the case at bar in the Seventh Circuit. We see in the record in the Circuit Court of Appeals in the Straus case, tried in the District Court before Judge Mack, Vol. VII, page 3994, that Judge Mack said to defendants' attorneys:

"Now, let us see. Suppose you should attempt to argue to the jury that it appears from the evidence that Macy's despite the fact that they had to pay more than other dealers, nevertheless made a profit on this business, and that therefore they cannot come in here and say that they were injured. I could not permit you to argue that to the jury. I would have to stop you, if you began to argue that because you would be arguing an immaterial thing, and I should have to tell the jury that it was utterly immaterial whether Macy's made a profit or not,"

and that the Court instructed the jury, as shown by the file in Vol. VIII, page 4600, as follows:

"I have not allowed any evidence to go in before you bearing on the question of profits or no profits that Macy may have gotten, or on the relative profits that they made before or after 1914, or a good many other questions which were attempted to be brought forward in connection with the question of damages. I have not allowed that because, in my judgment, it was not within the legal rules, and therefore, *whether they were right or wrong was immaterial*—and the same way with some of the points in that connection, that the defendants desired to bring forward: In my judgment they were not within the legal rules, and therefore they were entirely withdrawn from your consideration. I point this out because of the vast difference in what is ultimately claimed and what was originally claimed. I point it out, too, because the question that you will have, in so far as damages are concerned, is limited to the difference between what you believe from the evidence *Macy's actually paid for Victor goods during the periods in question, and what they would have paid for Victor goods if it had not been that this combination was in existence.*"

* * * * * * * *

"I have stated to you, gentlemen, as to whichever or both that you find the illegal combination existed or continued to exist, I have stated to you that the measure of damages is the difference between what Macy's actually had to pay out, *reasonably in the conduct of their business, and what they would have had to pay out for the same goods if they could have gotten the same goods under a regime of free competition.*"

* * * * * * * *

"I intended to say to you and overlooked it, that it is utterly immaterial whether or not Macy's were in the combination prior to May 1st, 1914. If they were in the combination or if they were not in the combination does not make a particle of difference; they had a right to get out, if they were in; they had a right to stay out if they were not in. Their right, if they had one, is based upon their not being in the combination during the period in question, and upon the alleged damage suffered

by reason of the combination, if these things are proven, *it is utterly immaterial whether or not, at one time, they were in it, or whether or not they are today in any illegal combination similar to this; it has nothing whatsoever to do with their right to recover in this case.*"

And again, Judge Mack said (Vol. XIV, pages 6432-3), in sustaining objections by plaintiff to defendants' questions to witnesses:

"Q. What was the total price realized by Macy's on the sale of those items, the total of which amounts to $278,733.53?

The Court: Objection sustained.

Mr. Griffin: Exception. May I inquire, your Honor, if that is on the ground that it is not proper cross examination, or does your Honor's ruling go further than that?

The Court: It goes further; it is on the ground that it is immaterial also. * * * I have come to a pretty clear conclusion on the legal rule in that respect, and I can not see how the question of possible profits or possible losses can affect the measure of damages on the actual purchase price."

And again (in Vol. XIV, pages 6437-8):

"That defendants' offer to prove by exhibits and testimony of witnesses that during the conspiracy period Macy, instead of having been damaged and caused a loss, actually made a profit of about $96,000 by purchasing below retail prices and selling largely at cut prices, increasing his volume of business,"

was denied by the Court.

The Circuit Court, affirming the judgment, said:

"Whether, then, plaintiffs sold to their customers at a profit or loss becomes immaterial in this case. They were entitled to goods at the reasonable price thereof. Through no legal fault of theirs, but because of defendants' wrong, they were deprived of their right, and the jury could find that such deprivation defined in money was the difference between the established reasonable price and the amounts plaintiffs were compelled to pay,

> provided as the trial judge charged, 'they acted reasonably in making these payments.' "

But the trial court in the case at bar, discussing the Straus case in *Leonard vs. Socony-Vacuum Oil Co., et al.*, 42 F. Supp. 369, said:

> "In the case of *Straus, et al., vs. Victor Talking Machine Co.*, 297 F. 791, the plaintiff was forced as a result of the alleged combination to buy his merchandise at retail prices, while his competitors were permitted to buy the same kind at wholesale prices. The plaintiff could not pass on this increase in price as he was required to sell at retail prices. He clearly sustained an actual pecuniary loss."

And, therefore, held that the Straus case was not applicable in the case at bar. Such interpretation of the Straus decision by the District Court in the case at bar would have Straus (Macy's Department Store in New York) continuously during a period of three years, 1914-1917, purchasing Victor goods at retail to the amount of $278,689.77, and selling the same goods at retail to the amount of $278,689.77.

Straus (Macy's Department Store) sued Victor and its distributors, as members of the conspiracy that fixed prices, to recover the difference between what he paid for merchandise because of the conspiracy and what he would have paid except for the conspiracy, he claimed nothing more on any other account; it was proven beyond dispute that the difference between what was paid and what would have been paid except for the conspiracy was $47,835.69 and judgment for that amount was rendered against the conspirators in the District Court and affirmed by the Circuit Court of Appeals. How, as the District Court in the case at bar construed that decision, could Straus have bought merchandise at retail and sell it at retail and have judgment in the District Court, affirmed in the Circuit Court of Appeals, for $47,000 as the difference between the two prices? But the facts in the

Straus case were, as the report of the decision of the Circuit Court of Appeals show, that while Victor's conspiracy intended thereby to compel Straus either to join the conspiracy which fixed prices or pay retail prices for Victor goods, Straus maneuvered around and purchased from distributors for much less than retail and made a profit of over $97,000 by selling at retail and cutting prices.

In the case at bar, McDowell, Vice-President of Mid-Continent Petroleum Corporation, one of the convicted Respondents, testified, that every increase in the tank car market was an immediate loss to the jobber in reducing his margin by that amount; he also testified that his Company (the smallest in the group) profited by the conspiracy from $1,000,000 to $2,000,000 each year during the conspiracy.

CONCLUSION

It is respectfully submitted that this Petition for a writ of certiorari should be granted.

W. P. CRAWFORD,
Attorney for Petitioner,
Northwestern Oil Company.

APPENDIX

(R. 1268-1273; Exhs. 154-156.)

Date	T. W. Margin	1935	T. W. Margin	1936	T. W. Margin
1934		1/1	.02198	1/1	.02007
1/1	.03648	2/2	.01898	2/13	.01882
1/8	.03773	2/18 to 2/3	.02323	1/14	.01757
1/11	.03898	3/9	.02198	1/15	.01632
1/18	.04023	3/13	.02073	1/17	.02007
1/22	.03898	3/18	.01948	2/22	.02132
1/25	.03773	3/30	.01823	2/27	.02257
1/27	.03648	4/6	.01698	3/4	.02132
1/29	.03523	4/12	.01998	8/27	.02257
2/1	.03398	4/17	.01873	8/29	(.01957)
2/14	.03523	4/18	.01907	(Dealer T. W. Mgn.	
2/17	.03648	4/22	.01782	8/31	.02082)
2/20 to 2/23	.03898	5/2	.02082	9/8	.02207
2/24	.03773	5/18	.01957	9/14	.02332
2/28	.03648	5/25	.01832	9/25	.02032
3/10	.03773	6/6	.01707	10/10	.01907
3/12	.03898	6/14 to 12/31	.02007	11/14	.01782
3/19	.04023			12/9	.02082
3/21	.04148				
3/27	.04273				
4/4	.04148				
4/9	.04023				
4/10	.03898				
4/11	.03773				
4/13	.03648				
4/17	.03523				
4/28	.03648				
5/1	.03773				
5/17	.03648				
5/19	.03523				
6/7	.03648				
6/9	.03773				
6/12	.03898				
7/27	.03773				
9/11	.01573				
10/4	.01698				
10/5	.01823				
10/9	.01948				
10/11	.02073				
10/12	.02198				
10/20	.01898				
10/31	.01773				
11/1	.01648				
11/2	.01523				
11/5	.01398				
11/9	.01273				
11/13	.01573				
11/30	.01448				
12/1	.01948				
12/7	.02073				
12/10	.02198				

Office - Supreme Court, U. S.
MAR 15 1944
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 725

NORTHWESTERN OIL COMPANY, A CORPORATION,
Petitioner,

vs.

SOCONY-VACUUM OIL COMPANY, INC., ET AL.,
Respondents.

BRIEF OF RESPONDENTS, SOCONY-VACUUM OIL COMPANY, INC., CONTINENTAL OIL COMPANY, THE PURE OIL COMPANY, SHELL OIL COMPANY, INC., SINCLAIR REFINING COMPANY, MID-CONTINENT PETROLEUM CORPORATION AND PHILLIPS PETROLEUM COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

DAVID T. SEARLS,
VINSON, ELKINS, WEEMS & FRANCIS,
Esperson Building,
Houston, Texas,

LEON E. ISAKSEN,
H. H. THOMAS,
THOMAS, ORR & ISAKSEN,
122 West Washington Avenue,
Madison, Wisconsin,

WILLIAM H. DOUGHERTY,
STANLEY M. RYAN,
NOLAN, DOUGHERTY, GRUBB & RYAN,
401 Jackman Building,
Janesville, Wisconsin,

J. H. MARSHUTZ,
FISH, MARSHUTZ & HOFFMAN,
1115 Wells Building,
Milwaukee, Wisconsin,

STURTEVANT HINMAN,
135 South La Salle Street,
Chicago, Illinois,

Attorneys for Respondents,
Socony-Vacuum Oil Company, Inc.,
Continental Oil Company,
The Pure Oil Company,
Shell Oil Company, Inc.,
Sinclair Refining Company,
Mid-Continent Petroleum Corporation,
Phillips Petroleum Company.

INDEX.

	PAGE
Reference to Opinion of Lower Court	1
Grounds of Jurisdiction	1
Statement of the Case	2-10
Summary of Argument	11-13
Argument	14-29
I. This Court Should Not Grant the Petition for Writ of Certiorari Because It Would Be Necessary, in Any Event, to Affirm the Judgment of the Lower Court as the Petitioner Has Failed to Bring Forward One of the Two Grounds Upon Which the Circuit Court of Appeals Based Its Decision	14
II. The Circuit Court of Appeals Was Correct in Affirming the Judgment of the Trial Court Because a Person Cannot Recover Damages Under the Clayton Act Unless He Has Shown Pecuniary Loss in Business or Property as the Proximate Result of a Violation of the Antitrust Laws	15
A. Personal Pecuniary Damage in Business or Property Is the Gist of an Action Under the Clayton Act	15
B. The Decision of the Seventh Circuit Court of Appeals in the Present Case Is in Accord With Decisions in Other Jobber Treble Damage Cases Arising Out of the Madison Oil Case	16
C. There Is No Conflict Between the Cases Cited by Petitioner and the Decision of the Circuit Court of Appeals in the Present Case	19

III. Petitioner's Evidence Failed to Establish Any Injury in Its Business or Property 24

A. Petitioner Did Not Bring Forward the Evidence in Its Possession Which Would Have Established Definitely Whether or Not the Increase in Its Purchase Price Was Passed On 24

B. The Only Reasonable Inference Which Can Be Drawn from the Evidence Is That Petitioner Sustained No Injury 25

IV. The Claim of Petitioner That Respondents Fixed and Limited Its Margin, and Fixed, Reduced and Limited the Retail Price Is Raised for the First Time in the Supreme Court and Is Without Support in the Pleadings or Evidence 26

V. Petitioner Cannot Maintain This Action Against Respondents, Because Both Petitioner and Respondents Were Participants in a Broad Stabilization Program to Raise Prices in Petroleum Markets, and Such Stabilization Program Was Found to Be Illegal in United States v. Socony-Vacuum Oil Co., Inc., et al., 310 U. S. 150 (1940) 28

Table of Cases Cited.

Bluefields S. S. Co., Limited v. United Fruit Co., 243 F. 1, 13-14, 18-19 (C. C. A. 3rd, 1917) 29

Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U. S. 390, 399, 27 S. Ct. 65, 51 L. Ed. 241 (1906) 18, 23

Davis v. Portland Seed Company, 264 U. S. 403, 44 S. Ct. 380, 68 L. Ed. 762 (1924) 20

Doughty-McDonald Grocery Company, et al. v. Atchison, Topeka & Santa Fe Railway Company, et al., 155 I. C. C. 47 (1929) 19

Eastman Kodak Co. v. Blackmore, 277 F. 694 (C. C. A. 2d, 1921) 29

Farmers Co-op. Oil Co. v. Socony-Vacuum Oil Co., Inc., et al., 133 F. (2d) 101, 103 (C. C. A. 8th, 1942) 17

Federal Trade Commission v. Pacific States Paper Trade Association, 273 U. S. 52, 66, 47 S. Ct. 255, 71 L. Ed. 534 (1927) 15

Foster & Kleiser Co. v. Special Site Sign Co., 85 F. (2d) 742, 750 (C. C. A. 9th, 1936), certiorari denied 299 U. S. 613 16

Fox Film Corp. v. Muller, 296 U. S. 207, 209, 210, 56 S. Ct. 183, 80 L. Ed. 158 (1935) 15

Galloway, Joseph, by Freda Galloway, his Guardian, Petitioner v. The United States of America, 319 U. S. 372, 87 L. Ed. 1042, 1051 (1943) 25

General Talking Pictures Corp. v. Western Electric Co., et al., 304 U. S. 175, 177-178, 58 S. Ct. 849, 82 L. Ed. 1273 (1938) 14

Glenn Coal Co. v. Dickinson Fuel Co., et al., 72 F. (2d) 885, 887 (C. C. A. 4th, 1934) 16

Gunning v. Cooley, 281 U. S. 90, 98, 50 S. Ct. 231, 74 L. Ed. 720 (1930) 14

Harriman v. Northern Securities Company, 197 U. S. 244, 298, 25 S. Ct. 493, 49 L. Ed. 739 (1905) 29

Helvering, Commissioner of Internal Revenue v. Taylor, 293 U. S. 507, 511, 55 S. Ct. 287, 79 L. Ed. 623 (1935) 14

Interstate Circuit, Inc., et al. v. United States, 306 U. S. 208, 226, 59 S. Ct. 467, 83 L. Ed. 610 (1939) 25

Jack v. Armour & Co., et al., 291 F. 741, 745 (C. C. A. 8th, 1923) 16

Keogh v. Chicago & Northwestern Railway Company, et al., 271 F. 444, 447 (C. C. A. 7th, 1921) 16

Keogh v. Chicago & Northwestern Railway Company, et al., 260 U. S. 156, 164-165, 43 S. Ct. 47, 67 L. Ed. 183 (1922) 12, 17, 21

Leonard v. Socony-Vacuum Oil Co., Inc., et al., 42 F. Supp. 369, 370 (D. C., W. D. Wis., 1942) 17

Locker, et al. v. American Tobacco Co., et al., 218 F. 447, 448 (C. C. A. 2d, 1914) 16

Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Company, 269 U. S. 217, 235, 46 S. Ct. 73, 70 L. Ed. 242 (1925) 19

Lynch, et al. v. New York ex rel Pierson, 293 U. S. 52, 54, 55, 55 S. Ct. 16, 79 L. Ed. 191 (1934) 11, 15

Maltz v. Sax, et al., 134 F. (2d) 2, 5 (C. C. A. 7th, 1943) 29

Miller, H. E., Oil Co. v. Socony-Vacuum Oil Co., Inc., et al., 37 F. Supp. 831 (D. C., E. D. Mo., E. D. 1941) 17

Mills v. Green, 159 U. S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1895) 15

Missouri Portland Cement Company v. Director General, as Agent, 88 I. C. C. 492, 495, 496 (1924) 20

New York, N. H. & H. R. Co., et al. v. Ballou & Wright, 242 F. 862, 867 (C. C. A. 9th, 1917) 19

Nicola, Stone & Myers Company v. Louisville & Nashville Railroad Company, et al., 14 I. C. C. 199, 209 (1908) 20

Palmer, et al. v. Connecticut Railway & Lighting Co., 311 U. S. 544, 561, 61 S. Ct. 379, 85 L. Ed. 336 (1941) 25

Pennsylvania Railroad Company v. International Coal Mining Company, 230 U. S. 184, 202-203, 204-205, 206, 33 S. Ct. 893, 57 L. Ed. 1446 (1912) 20

Prudence Co., Inc., The v. Fidelity & Deposit Company of Maryland, et al., 297 U. S. 198, 208, 56 S. Ct. 387, 80 L. Ed. 581 (1936) 11, 15

Richardson v. McChesney, Secretary of State of the Commonwealth of Kentucky, 218 U. S. 487, 492, 31 S. Ct. 43, 54 L. Ed. 1121 (1910) 11, 15

Shuell, et al. v. London Amusement Co., 123 F. (2d) 302, 306 (C. C. A. 6th, 1941) 25

Southern Pacific Company, et al. v. Darnell-Taenzer Lumber Company, et al., 245 U. S. 531, 534, 38 S. Ct. 186, 62 L. Ed. 451 (1918) 19, 21

State of Oklahoma v. State of Texas, 256 U. S. 70, 88, 41 S. Ct. 420, 65 L. Ed. 831 (1921) 6

Story Parchment Company v. Paterson Parchment Paper Company, et al., 282 U. S. 555, 562, 51 S. Ct. 248, 75 L. Ed. 544 (1931) 25

Straus, et al. v. Victor Talking Mach. Co., et al., 297 F. 791 (C. C. A. 2d, 1924) 12, 22

Tennessee v. Condon, 189 U. S. 64, 70, 71, 23 S. Ct. 579, 47 L. Ed. 709 (1903) 15

Twin Ports Oil Co. v. Pure Oil Co., 119 F. (2d) 747, 750, 751 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 644, 86 L. Ed. 77, motion for rehearing denied 314 U. S. 711, 86 L. Ed. 102 ..... 11, 16, 21, 22

United States v. Pink, 315 U. S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942) 6

United States v. Socony-Vacuum Oil Co., Inc., et al., 310 U. S. 150, 190-192, 198-200, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) 2, 6, 18, 26, 28

Victor Talking Mach. Co. v. Kemeny, 271 F. 810, 816 (C. C. A. 3rd, 1921) 29

STATUTES CITED.

Clayton Act, October 15, 1914, Sec. 4, 38 Stat. 730; Title 15 U. S. C. A. Sec. 15 ..... 1, 3, 15, 16, 17, 18, 19, 20, 22, 28

Interstate Commerce Act, Act of February 4, 1887, Secs. 1, 2, 4, Title 49 U. S. C. A. Secs. 1, 2 and 4 .... 19, 20

Sherman Act, Act of July 2, 1890, 26 Stat. 209; Title 15 U. S. C. A. Sec. 1 1

RULES CITED.

Rule 38, Supreme Court Rules 11, 14, 29

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 725

NORTHWESTERN OIL COMPANY, A CORPORATION,
Petitioner,

vs.

SOCONY-VACUUM OIL COMPANY, INC., ET AL.,
Respondents.

BRIEF OF RESPONDENTS, SOCONY-VACUUM OIL COMPANY, INC., CONTINENTAL OIL COMPANY, THE PURE OIL COMPANY, SHELL OIL COMPANY, INC., SINCLAIR REFINING COMPANY, MID-CONTINENT PETROLEUM CORPORATION AND PHILLIPS PETROLEUM COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The opinion of the Circuit Court of Appeals appears on pages 1353 to 1358 of the record and is reported in 138 F. (2d) 967 (Dec. 7, 1943).

JURISDICTION.

Petitioner asserts that the jurisdiction of this Court is invoked on the ground that the case is based upon an alleged violation of the Sherman and Clayton Antitrust Acts. Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. §1; Act of October 15, 1914, 38 Stat. 730, 15 U. S. C. A. § 15. (Petition for Writ of Certiorari, p. 2.)

STATEMENT OF THE CASE.

1. The Proceedings in the Trial Court and the Circuit Court of Appeals.

This action was brought by petitioner, Northwestern Oil Company, to recover treble the damages alleged to have been sustained by it as a result of the conspiracy for which the respondents were convicted in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150 (1940) (Madison Oil Case).

Petitioner alleges in its complaint that it is a jobber engaged in the business of purchasing and selling gasoline (R. 5-6). Petitioner further alleges that as a result of the conspiracy charged in the Madison Oil Case, there was an increase in the tank car price of gasoline resulting in petitioner paying a higher price for gasoline purchased by it, and that it did not pass on the amount of this increase to its customers (R. 6-9, 28-29).

Respondents denied that petitioner sustained any damage, and alleged as a special defense that petitioner was in *pari delicto* with them and had knowingly combined with them and others to raise retail prices in certain parts of the Middle West, which was the purpose of the conspiracy charged in the Madison Oil Case (R. 39-41).

During the trial of the case, petitioner dismissed any claim for damages on gasoline consumed and not resold by it, and sought to maintain this action for damages solely on gasoline bought and resold (R. 1313).

At the conclusion of petitioner's case in the trial court, respondents moved for a directed verdict on two grounds: (1) there was no evidence that petitioner had been injured

in its business or property; and (2) the undisputed evidence established that petitioner participated in the conspiracy and was in *pari delicto* with respondents (R. 1313-1315). The trial court sustained respondents' motion upon the first ground and found it unnecessary to pass upon the second ground (R. 987).

The Circuit Court of Appeals affirmed the judgment of the trial court upon both grounds (R. 1357-1358). The Circuit Court of Appeals made the following findings of fact:

> (1) Plaintiff wholly failed to prove any loss to its property or business, and as the increases in plaintiff's buying price were followed by corresponding increases in its selling price, the only reasonable inference from the record is that plaintiff sustained no loss (R. 1354, 1357).
>
> (2) The proof discloses that in the meetings and conferences, as a result of which stabilization of prices came about, plaintiff's officers participated and cooperated and were well advised that the program was intended to establish an increased tank car quotation in order to maintain retail prices in plaintiff's territory; and that the letters and testimony of plaintiff's officers clearly established that plaintiff was an active agency in working out with defendants and others the scheme of which it now complains and in raising and maintaining prices (R. 1355).

The Court announced two propositions of law:

> (1) "The Clayton Act does not permit recovery by plaintiff in causes such as this for unlawful prices as such but authorizes recovery only of pecuniary loss to property or business." (R. 1357.)
>
> (2) "Where parties stand in *pari delicto*, the law leaves them where it finds them." (R. 1358.)

The finding of fact and holding of the Circuit Court of Appeals on *pari delicto* are not brought forward by any question in the Petition for Writ of Certiorari.

2. The Facts.

(a) The Facts Relating to Petitioner's Claim of Injury.

Petitioner is a jobber, buying gasoline and reselling it to other jobbers, retail dealers and consumers (R. 223, 369). Petitioner did not buy any gasoline from respondents, but purchased from a large jobber, W. H. Barber Company, who in turn bought from the refiner, Tide Water Oil Company (R. 400-403).

The facts establish that petitioner's buying price and likewise its selling price to other jobbers, dealers and consumers were all based upon the tank car spot market.

The W. H. Barber Company bought from Tide Water at ¼c per gallon below the published tank car market (Ex. 15, R. 243, 559; Ex. 146, R. 508, 510), and resold to petitioner at the low of this market with certain credits (R. 400-403, 223; Ex. 15, R. 243, 559). Petitioner was assured a margin by Barber of 5¼c and subsequently 5⅜c per gallon between the tank car price plus freight and the service station price established from time to time by Standard Oil Company of Indiana (Ex. 15, R. 243, 560, 563-564). Petitioner resold gasoline in tank cars to other jobbers at the average of the high and low quotations of the same tank car spot market upon which it purchased (R. 369; Ex. 13, R. 242, 1051). It resold to dealers at tank wagon prices, which until August 1936 were determined by deducting a fixed discount from established service station prices (R. 250-251, 303-304). It resold to consumers at service station prices or at the consumers' tank wagon price (R. 250). Petitioner's selling price did not vary with each sale as a result of bargaining between seller and buyer. The price at which petitioner sold to consumers and dealers was determined at all times by the posted prices of the market leader, Standard Oil Company of Indiana, as it was cus-

tomary for petitioner and other jobbers to follow the posted prices of this market leader (R. 252-253, 571). In 1935 and 1936 Standard's service station and tank wagon prices followed the increases and decreases in the tank car market as they were based on that market. Commencing on September 11, 1934 and continuing during 1935 and 1936, Standard's formula for determining its retail price was: tank car price, plus freight, plus taxes, and plus 5½¢ per gallon (R. 160-161, 203-204, 214). This formula was adopted by the Department of Agriculture and Markets of Wisconsin in Order 23C, which fixed the minimum service station price in Wisconsin during the period between February and June 1935 (Ex. 61, R. 380, 382-384).

The facts sustain the finding of the Circuit Court of Appeals that petitioner sustained no pecuniary loss in business or property. The increases in the tank car market complained of by petitioner, commenced early in 1935, and by June 1935 the tank car market had increased 1.25¢. During this period, petitioner's sales price to dealers and consumers had increased 1.3¢. There were no further changes in either petitioner's buying or selling prices in the remainder of 1935. In January 1936, petitioner's buying price increased .5¢ and its selling price increased .5¢. There were decreases in petitioner's buying price in 1936 of .625¢ and there were decreases in its selling price of .6¢. In October and November 1936, petitioner's buying price increased .25¢, and in December its selling price increased .3¢. Since the tank car market moves in eighths and the service station and tank wagon markets move in tenths, there were times when the buying or selling price of petitioner had increased slightly more than the other, but on December 31, 1936, the net increase in the *selling* price was .059¢ more than the net increase in the buying price (R. 329-336; Exs. 155, 156, R. 667, 1270-1273; Ex. 25, R. 376, 1070).

The fact that an increase in the tank car market would result directly in an increase in the retail market was the basic principle of the Madison Oil Case.[1]

In the present case petitioner offered in evidence a computation purporting to show the amount it paid for gasoline in 1935 and 1936, as compared with the amount it would have paid at the tank car price in effect on February 19, 1935 (Ex. 165, R. 913, 1301). Petitioner did not offer any computation of its increased income resulting from increases in its selling price during those years, nor did petitioner prove the amount of gasoline sold by it during those years or during any price period.

---

1. The indictment in the Madison Oil Case charged that an increase in tank car prices will result directly in an increase in retail prices of gasoline and that defendants intentionally increased the tank car price of gasoline and in turn intentionally raised the general level of retail prices prevailing in the Midwestern area (including the Western District of Wisconsin) (Ex. 1, R. 110, 1000-1001). The trial court, in its charge to the jury in that case, instructed them to return a verdict of "not guilty" unless they found that the defendants had intentionally raised the tank car price of gasoline "and in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area, including the Western District of Wisconsin" (Ex. 1-A, R. 834, 1028).

See opening statements and closing arguments of Government counsel in Madison Oil Case (R. 103, 105-106, 2309 in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, Nos. 346 and 347, 310 U. S. 150 (1940)), and opinion of the Supreme Court in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150, 190-192, 198-200 (1940).

For the purpose of determining the extent of the judgment in the Madison Oil Case as *prima facie* evidence in this case, the court may examine the proceedings in that case, *State of Oklahoma* v. *State of Texas*, 256 U. S. 70, 88 (1921); and a court may take judicial notice of its records, *United States* v. *Pink*, 315 U. S. 203 (1942).

(b) **Price Stabilization Activities of Petitioner and Respondents.**

In 1934 all prices in the petroleum industry were demoralized as a result of the economic depression and the unlawful production of crude oil from the largest field in the world, the East Texas Oil Field (R. 122-129). The sale of both hot and distress gasoline was bringing about price wars in the tank car market, and many retailers were buying this cheap gasoline and were cutting the retail market, which was resulting in price wars in that market (R. 123, 128-129). In order to solve these problems, Harold L. Ickes, the Petroleum Administrator, wrote a letter to C. E. Arnott (the principal individual defendant in the Madison Oil Case) directing him to take action to restore markets to normal conditions (Ex. 4, R. 162, 163). Pursuant to this letter, Arnott appointed a General Stabilization Committee, which in turn brought about the appointment of various state and county price stabilization committees in the Middle West. All of the different units in the marketing branch of the industry were represented on these committees, namely, major oil companies, jobbers, dealers and others (R. 134). In December, 1934, there was a meeting of the General Stabilization Committee in Chicago, which was attended by representatives of the major oil companies, jobbers, dealers and other marketers. At this meeting, it was agreed to raise many subnormal markets to normal in the Middle West, and this agreement was made effective by state price stabilization committees, state jobbers' associations and other (R. 137-139). At a subsequent meeting in Chicago in January, 1935, of this same General Stabilization Committee, Arnott stated that there could not be stabilization in the retail market without having a firm tank car market, and he appointed a subcommittee, known as the Tank Car Stabilization Committee, to study the problem of the tank car

market and to work out a plan that would enable the independent refiner to make a profit and that would support a normal retail price structure (R. 140-143). This Tank Car Committee developed the buying program complained of by petitioner in the present case (R. 144-149); and this Committee made reports of its activities from time to time to the parent committee, the General Stabilization Committee (R. 154-155). The Tank Car Committee met monthly until February, 1936, and at this last meeting it was discontinued (R. 148, 150).

Petitioner was an active participant in the stabilization plan of the General Stabilization Committee and knew of the existence of the buying programs of 1935. Petitioner knew that it was essential to stabilize the tank car market in order to maintain normal retail prices in its territory (R. 408-409, 442-444, 446). Its Vice President and General Manager, A. F. Podvin, complained to the Petroleum Administrative Board in Washington of the tank car market bringing about a demoralized condition in the retail market (Ex. 83, R. 438, 445). Margold of the Petroleum Administrative Board replied to Podvin and stated that they realized that it was essential to eliminate the distress gasoline in order to achieve any degree of stabilization (Ex. 84, R. 438, 446). After the appointment of the various stabilization committees by Arnott in the summer of 1934, Podvin requested petitioner's employees to cooperate with these committees (Ex. 68, R. 414, 415). He knew of the Chicago meeting of the General Stabilization Committee in December, 1934; he knew that Arnott had recommended the restoration of subnormal prices in petitioner's marketing territory in Minnesota; and he worked and combined with respondents and others to carry out the agreement reached at this Chicago meeting (R. 452-464). Podvin testified that he and other representatives of petitioner attended stabilization meetings in 1934, 1935

and 1936; that agreements were made at some of these meetings to restore subnormal prices to normal; and that there were representatives of the major oil companies, jobbers and others at these meetings (R. 463, 488-490). Podvin testified that he knew that the Minnesota and Wisconsin stabilization committees, with which he was working, were functioning under the General Stabilization Committee headed by Mr. Arnott (R. 457). Petitioner's President, H. M. McKenzie, testified that he learned of the buying programs shortly after March, 1935, and that he talked with other officers of the petitioner about these programs (R. 492-493). The letters written by Podvin, as well as his testimony, establish that petitioner, with full knowledge of the scope of the stabilization program, was active in working with respondents and others in raising prices both before and after the NRA was invalidated by the Supreme Court (R. 472-489).

3. Factual Errors in Petitioner's Brief.

There are many purported statements of fact in Petitioner's Brief without supporting record references; many of these are misstatements. We call attention to the following:

(1) On Page 21 petitioner states that "The District Court * * * did intimate that there was no proof of *pari delicto*. * * *" On the contrary the District Court said: "While there may be evidence to sustain a finding that the plaintiffs were active participants in the stabilization plan, I don't think that it is necessary for the Court to pass upon that portion of the motion at this time, * * *" (R. 987).

(2) Petitioner makes several references to the fact that it consumed about 2% of the gasoline purchased by it (Pet's. Brief, pp. 7, 13). Petitioner fails to call attention to the fact that during the trial it dismissed any claim for damages on gasoline consumed or not resold by it (R. 1313).

(3) Petitioner sets out a schedule of margins in the appendix to its brief and refers to them as if they were the margins of petitioner. The exhibit showing these margins for 1934 was excluded by the trial court (R. 669), and the exhibits showing these margins for 1935 and 1936 were ordered corrected so that the jury would not be confused into believing that they were petitioner's margins (R. 496-497, 667-672). Petitioner received larger margins (R. 337-339).

(4) On Page 22 petitioner states:

> "Podvin's activities with reference to restoring prices in areas where price wars existed, were discontinued upon becoming suspicious that Respondents were rigging the market. * * *
>
> "If it be said that Podvin took part in the conspiracy which raised prices, he did so innocently. * * *"

Podvin testified that he took an active part in stabilization activities in 1934, 1935 and 1936 (R. 463, 488-489). With reference to his innocence, he concluded a letter in August, 1935 in regard to raising prices with this statement:

> "Since the cancellation of the N. R. A. we are not supposed to talk prices or come to any agreement between one another on prices, therefore, I am not making a copy of this letter and will ask you to kindly destroy same after reading it so it will not get into your files" (Ex. 103, R. 474, 478).

Since this is an appeal from a judgment sustaining respondents' motion for a directed verdict at the conclusion of petitioner's case, respondents must accept the facts shown by the record for the purposes of this appeal.

SUMMARY OF ARGUMENT.

I.

The Petition for Writ of Certiorari does not bring forward any question relating to the holding of the Circuit Court of Appeals that petitioner was in *pari delicto* with respondents. The Court held that this was a sufficient ground to support the directed verdict for respondents. As this question is not brought forward, it is not before this Court (*Rule 38, Supreme Court Rules*) and this Court, in any event, would have to affirm the judgment of the Circuit Court of Appeals. The Supreme Court will not take jurisdiction to decide moot questions, or when it appears that the decision of the lower court will have to be affirmed regardless of how this Court resolves the questions raised by the petition. *The Prudence Co., Inc.* v. *Fidelity & Deposit Company of Maryland, et al.*, 297 U. S. 198, 208 (1936); *Lynch, et al.* v. *New York ex rel. Pierson*, 293 U. S. 52, 54, 55 (1934); *Richardson* v. *McChesney, Secretary of State of the Commonwealth of Kentucky*, 218 U. S. 487, 492 (1910).

II.

The Circuit Court of Appeals properly affirmed the judgment of the trial court because no one is entitled to recover damages under the antitrust laws unless he has sustained a pecuniary loss in business or property. This is a well settled rule.

The decision in the present case that a jobber is not entitled to recover the amount of an increased price *as such* is in accord with decisions of the Eighth Circuit Court of Appeals, *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d)

747, 750, 751 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 644, rehearing denied 314 U. S. 711, and various District Courts in jobber cases arising out of the Madison Oil Case. This is the rule adopted by the Supreme Court. *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 260 U. S. 156, 164-165 (1922).

Where, as here, and as charged in the Madison Oil Case, the conspiracy has raised the whole market structure, the jobber or middleman has not sustained any loss. Under petitioner's claim that any person who has paid an increased price may recover, the Barber Company, the petitioner, the subjobber, the dealer and the consumer, each would be entitled to recover three times the amount of the original increase upon the same gallon of gasoline.

The freight rate overcharge cases, relied upon by petitioner, are not applicable because such cases hold that under the Interstate Commerce Act there can be a recovery of an overcharge without proof of pecuniary loss and the only one who can recover is the one in privity with the carrier. This Court has held that such cases are not applicable to an action for damages under the antitrust laws. *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 260 U. S. 156, 164-165 (1922). The decision in *Straus, et al.* v. *Victor Talking Mach. Co., et al.*, 297 F. 791 (C. C. A. 2d, 1924) does not conflict with the decision in the present case, because in that case Straus sustained a pecuniary loss which was measured exactly by the increase in the purchase price to him. Moreover, here the conspiracy has raised both the buying and selling prices of petitioner. Since petitioner has based its case upon the Madison Oil Case, it must accept the conspiracy and its total effect as charged in that case and found to exist here, which was the raising of both the tank car and retail prices of gasoline.

III.

Petitioner failed to prove any loss in business or property and the only reasonable inference from the evidence, which establishes that there were corresponding increases in petitioner's buying and selling prices as a result of the conspiracy, is that petitioner sustained no loss.

IV.

The claim of petitioner that there was a conspiracy to limit the jobber's margins and to reduce or limit the retail price is raised for the first time in the Supreme Court and is without support in the pleadings or evidence.

V.

The undisputed evidence establishes that petitioner is in *pari delicto* with respondents and as the finding of fact of the Circuit Court of Appeals on this point has not been brought forward by any question in the petition for writ of certiorari, such finding is binding on this Court. Where parties are in *pari delicto*, the law leaves them where it finds them.

ARGUMENT.

I.

This Court Should Not Grant the Petition for Writ of Certiorari Because It Would Be Necessary, in Any Event, to Affirm the Judgment of the Lower Court as the Petitioner Has Failed to Bring Forward One of the Two Grounds Upon Which the Circuit Court of Appeals Based Its Decision.

Respondents urged to the Circuit Court of Appeals that the directed verdict should be sustained upon the *pari delicto* ground as well as upon the ground that the petitioner had proved no damage in its business or property. The Circuit Court of Appeals found as a fact that the petitioner had been a participant in the conspiracy and held that:

> "Having participated in this illegal undertaking, plaintiff may not recover; where parties stand in *pari delicto*, the law leaves them where it finds them * * *." (R. 1358.)

The Court held that this was a sufficient ground to support the judgment for respondents.

The Petition for Writ of Certiorari does not question the correctness of, and in fact does not even mention, the decision of the Circuit Court of Appeals that a verdict was properly directed for the respondents on the ground that the petitioner was in *pari delicto*. Not having brought this question forward, it is not before this Court. *Rule 38, Supreme Court Rules; Gunning* v. *Cooley*, 281 U. S. 90, 98 (1930); *Helvering, Commissioner of Internal Revenue* v. *Taylor*, 293 U. S. 507, 511 (1935); *General Talking Pictures Corp.* v. *Western Electric Co., et al.*, 304 U. S. 175, 177-178 (1938). Therefore, this holding of the Circuit Court of

Appeals must be assumed to be correct, and the judgment in this case, in any event, would have to be affirmed. *The Prudence Co., Inc.* v. *Fidelity & Deposit Company of Maryland, et al.*, 297 U. S. 198, 208 (1936); *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 66 (1927).

This Court will not take jurisdiction when it appears, as it does here, that the decision would have to be affirmed regardless of how this Court resolves the point raised by petitioner. *Lynch, et al.* v. *New York ex rel. Pierson*, 293 U. S. 52, 54, 55 (1934) and *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 209, 210 (1935). It is the policy of this Court to decide only actual controversies by a judgment that can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the rights of the parties in the case before it. *Richardson* v. *McChesney, Secretary of State of the Commonwealth of Kentucky*, 218 U. S. 487, 492 (1910); *Mills* v. *Green*, 159 U. S. 651, 653 (1895); *Tennessee* v. *Condon*, 189 U. S. 64, 70, 71 (1903).

II.

The Circuit Court of Appeals Was Correct in Affirming the Judgment of the Trial Court Because a Person Cannot Recover Damages Under the Clayton Act Unless He Has Shown Pecuniary Loss in Business or Property as the Proximate Result of a Violation of the Antitrust Laws.

A. Personal Pecuniary Damage in Business or Property Is the Gist of an Action Under the Clayton Act.

Section 4 of the Clayton Act (15 U. S. C. A. § 15), upon which this action is based, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the

> antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee * * *."

No one is entitled to recover under this section unless he has suffered a pecuniary loss in his business or property as a result of a violation of the antitrust law. The mere fact that respondents have been convicted in a criminal prosecution does not give petitioner a cause of action. Pecuniary loss is the gist of the action. *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 271 F. 444, 447 (C. C. A. 7th, 1921) affirmed 260 U. S. 156; *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F. (2d) 742, 750 (C. C. A. 9th, 1936), certiorari denied 299 U. S. 613; *Glenn Coal Co.* v. *Dickinson Fuel Co., et al.*, 72 F. (2d) 885, 887 (C. C. A. 4th, 1934); *Jack* v. *Armour & Co., et al.*, 291 F. 741, 745 (C. C. A. 8th, 1923); *Locker, et al.* v. *American Tobacco Co., et al.*, 218 F. 447, 448 (C. C. A. 2d, 1914).

B. The Decision of the Seventh Circuit Court of Appeals in the Present Case Is in Accord With Decisions in Other Jobber Treble Damage Cases Arising Out of the Madison Oil Case.

The decision in the present case by the Seventh Circuit Court of Appeals is in accord with decisions by the Eighth Circuit Court of Appeals and with decisions of various District Courts in jobber cases arising out of the Madison Oil Case. These courts have recognized that the cases relied upon by petitioner here are not applicable to a jobber action.

The first treble damage case brought against respondents, as a result of the Madison Oil Case, was a suit by a jobber reported in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747, 750 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 644, rehearing denied 314 U. S. 711. The Court held that the Clayton Act does not authorize the recovery of an

unlawfully increased price but only the recovery of damages resulting therefrom. The same cases relied upon by petitioner here were urged upon the Supreme Court in the petition for certiorari in that case.

Other jobber treble damage cases to the same effect are: *Leonard* v. *Socony-Vacuum Oil Co., Inc., et al.*, 42 F. Supp. 369, 370 (D. C., W. D. Wis., 1942); *H. E. Miller Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 37 F. Supp. 831 (D. C., E. D. Mo., E. D., 1941); *Farmers Co-op. Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 133 F. (2d) 101, 103 (C. C. A. 8th, 1942).

These decisions are in accord with the rule adopted by the Supreme Court. This Court in *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 260 U. S. 156, 164-165 (1922) held that the exaction of a higher freight rate as the result of a conspiracy did not in and of itself establish any damage under the antitrust laws to the shipper.

The contention of petitioner that the Clayton Act authorizes the recovery of the amount of an increased payment *as such*, irrespective of pecuniary damage, is not only contrary to the express wording of the Clayton Act and the decisions construing it, but would lead to most inequitable and absurd results.

Witness the course of a gallon of gasoline from producer to consumer under the facts of this case where the petitioner is the *second* jobber in the chain from producer to consumer.

The Tide Water Company, the producer, sold to the Barber Company, a jobber, at ¼¢ under the low quotation of the tank car price as published in the Chicago Journal of Commerce (Ex. 15, R. 243, 559); the Barber Company then sold the same gasoline to petitioner at an invoiced price equal to the low of the tank car price as published in the Chicago Journal of Commerce (R. 223, 254); the

petitioner then sold the same gasoline to its subjobbers at the average of the high and low quotations of the tank car prices as published in the Chicago Journal of Commerce (R. 369; Ex. 13, R. 242, 1051); or it sold such gasoline to dealers or consumers at the dealer tank wagon or service station price posted by Standard Oil Company which was based upon the tank car price as published in the Chicago Journal of Commerce (R. 160-161, 252, 387, 571). In other words, the buying price of Barber, petitioner, subjobber, dealer and consumer were all based upon the spot tank car price as published in the Chicago Journal of Commerce. As stated by the Supreme Court in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150 (1940):

> "• • • the spot market was a 'peg to hang the price structure on'." (p. 192)

Thus, upon any unlawful rise in the tank car price, both petitioner's buying and selling prices were increased. The same was true as to the buying and selling prices of Barber, and of petitioner's subjobber and of petitioner's dealer. Only the consumer, who is not a reseller, found himself bearing the increase in price. Where the consumer has paid the amount of an unlawful increase, he, and he alone, is the person who has sustained pecuniary loss within the meaning of the Clayton Act. He is the one injured, because his property has been diminished. In construing the similar section of the Sherman Act, Mr. Justice Holmes, in *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U. S. 390 (1906), said:

> "• • • A man is injured in his property when his property is diminished. • • •" (p. 399)

Where, as here, the conspiracy has raised the whole market structure, the jobber's or middleman's property has not been diminished.

Under petitioner's claim that any person who has paid an increased price may recover three times the amount of

that increase without proof of pecuniary loss, the Barber Company, the petitioner, the subjobber, the dealer and the consumer, each, would be entitled to recover three times the amount of the original increase upon the same gallon of gasoline. This would create a total liability upon the respondents of fifteen times the amount of the increase.

However, petitioner suggests that the consumer cannot recover because he was not in privity with respondents (Pet's. Brief, p. 14). Neither was petitioner in privity with respondents as it did not purchase gasoline from them. But, of course, privity is not essential to a recovery under the anti-trust laws and petitioner cannot deny the consumer a right of recovery on this ground.

C. There Is No Conflict Between the Cases Cited by Petitioner and the Decision of the Circuit Court of Appeals in the Present Case.

In support of its contention that it can recover the amount of the increased price as such, petitioner relies on certain freight rate cases. These freight rate cases are not applicable. The recovery of a tariff overcharge under the Interstate Commerce Act (49 U. S. C. A. § 1) differs from a recovery under the Clayton Act, in the following respects:

(1) A tariff overcharge is recoverable *as a matter of law*, without showing a pecuniary loss. *Louisville & Nashville Railroad Co.* v. *Sloss-Sheffield Steel & Iron Company*, 269 U. S. 217, 235 (1925); *New York, N. H. & H. R. Co., et al.* v. *Ballou & Wright*, 242 F. 862, 867 (C. C. A. 9th, 1917); *Doughty-McDonald Grocery Company, et al.* v. *Atchison, Topeka & Santa Fe Railway Company, et al.*, 155 I. C. C. 47 (1929).

(2) As the recovery is of the tariff overcharge *as such*, only persons in privity with the carrier are entitled to recover—thus, suit must be brought by the one who paid the overcharge and against the carrier which collected the overcharge. *Southern Pacific Com-*

pany, et al. v. *Darnell-Taenzer Lumber Company, et al.* 245 U. S. 531, 534 (1918); *Missouri Portland Cement Company* v. *Director General, as Agent*, 88 I. C. C. 492, 495, 496 (1924); *Nicola, Stone & Myers Company* v. *Louisville & Nashville Railroad Company, et al.*, 14 I. C. C. 199, 209 (1908).

(3) An action under the Clayton Act is a tort action. Such action is not for recovery of an overcharge as such, but is "for threefold the *damages* by him sustained." Recovery is not limited to persons in privity with the wrongdoer but extends to all persons who have suffered pecuniary loss as a natural and probable result of the illegal act. The amount of damages may be more or less than the amount of any increase in price.

Thus, the Interstate Commerce Act authorizes the recovery of a tariff overcharge by the one who pays it in the first instance; the Clayton Act authorizes the recovery of damages sustained.

The distinctive character of the railroad rate overcharge cases, which do not require proof of pecuniary loss, is emphasized by the fact that in suits by persons under the Interstate Commerce Act for a violation of Section 2 (unjust discrimination provision) or for a violation of Section 4 (the long-and-short-haul provision), pecuniary loss must be established. *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U. S. 184, 202-203, 206 (1912); *Davis* v. *Portland Seed Company*, 264 U. S. 403 (1924).

The Clayton Act is subject to the same rules of proof as announced in the *International Coal Case*, and the so-called rate reparation cases construing Section 1 of the Interstate Commerce Act are wholly inapplicable. The Supreme Court has held that the rule requiring pecuniary loss, as announced in the *International Coal Case*, is controlling in a treble damage action under the anti-trust laws,

and that the rule of *Southern Pacific Company, et al.* v. *Darnell-Taenzer Lumber Company, et al.*, 245 U. S. 531 (1918), which is relied upon by petitioner, is not applicable. In *Keogh* v. *Chicago & North Western Railway Company, et al.*, 260 U. S. 156 (1922), the Supreme Court said:

> "* * * Under § 7 of the Anti-Trust Act, as under § 8 of the Act to Regulate Commerce, *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. To make proof of such facts would be impossible in the case before us. It is not like those cases where a shipper recovers from the carrier the amount by which its exaction exceeded the legal rate. *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531. * * *" (p. 164-165)

Thus the Seventh Circuit Court of Appeals in the present case and the Eighth Circuit Court of Appeals in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747, 750, 751 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 644, rehearing denied 314 U. S. 711, followed the rule announced by the Supreme Court in holding that the principle of the rate overcharge cases was not applicable in a suit for damages under the anti-trust laws.

Even if the rate reparation cases were applicable, petitioner cannot recover under the very rule for which it contends. Under those cases, the only one who can recover is the one who paid the increased price in the first instance, and the suit must be against the one who received the increased price in the first instance. *This petitioner is not the party who first paid the alleged increase and the respondents are not the parties to whom the alleged increase was paid.* The alleged illegal increase in the tank car price

was first paid by the W. H. Barber Company, who purchased from Tide Water.

In addition to the rate reparation cases, petitioner relies upon certain treble damage cases. A brief analysis of these cases shows that they are not in conflict with the decision in the present case and that they do not in the least depart from the long line of cases requiring pecuniary loss under the Clayton Act.

The plaintiff in *Straus, et al.* v. *Victor Talking Mach. Co., et al.*, 297 F. 791 (C. C. A. 2d, 1924), was a retailer who had been accustomed to buying Victor products at wholesale prices. Because plaintiff refused to abide by certain trade practices imposed by the Victor Company, that company refused to permit Straus to continue to buy at wholesale. His competitors continued to receive the benefit of the wholesale prices. In order to supply his customers, Straus was forced to buy Victor products on the retail market.

This case is neither applicable nor controlling here, because:

(1) Straus was forced from a wholesale to a retail market. In other words, Straus was forced to buy and sell on the retail market. *He thus suffered an actual pecuniary loss which was measured exactly by the increase in the price to him.*

(2) Only the price to Straus was raised and he was the only one injured as a result of the conspiracy. His selling price was not raised. In the present case the whole market structure has been raised as a result of the conspiracy and the consumer has borne the increase in price.

(3) The *Straus Case* was urged upon the Circuit Court of Appeals in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747 (C. C. A. 8th, 1941). It was cited or quoted from in the plaintiff's brief no less than a dozen times. It was urged upon the Supreme Court in the petition for writ of certiorari and the petition

was denied (314 U. S. 644). In view of the many anti-trust decisions holding that pecuniary loss is essential to recovery under the anti-trust laws, statements in the *Straus Case* must be considered in the light of the facts of that case which established that a pecuniary loss had been sustained in the amount of the increase in price which was the difference between the wholesale price and the price paid by Straus.

It has already been pointed out that in *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 399 (1906), the plaintiff was injured because its property was diminished. The City of Atlanta had purchased pipe for its own use in its own city water system and the pipe was not purchased for resale. Thus, the City was a consumer and it bore the illegally increased price. The City of Atlanta, therefore, actually sustained a pecuniary loss which was measured by the amount of the illegally increased price of the pipe.

The cases cited by petitioner are not controlling for a still further reason:

In the Madison Oil Case, upon which petitioner bases this case, the respondents were charged with and convicted of raising the tank car and in turn the retail price of gasoline. Thus, under the theory of that case, both petitioner's buying and selling prices were raised as a result of this conspiracy. As petitioner has based its case upon the conspiracy established in the Madison Oil Case, it cannot at its convenience take a part of this conspiracy and reject the rest. It must accept the conspiracy and its total effect, as charged in that case, which was the raising of both the tank car and retail prices of gasoline. This fact in and of itself is sufficient to distinguish this case from the cases cited by petitioner.

III.

Petitioner's Evidence Failed to Establish Any Injury in Its Business or Property.

A. Petitioner Did Not Bring Forward the Evidence in Its Possession Which Would Have Established Definitely Whether or Not the Increase in Its Purchase Price Was Passed On.

Petitioner did not sustain the burden of proof placed upon it by the statute which requires proof of injury in business or property. Although petitioner stood before the Court strictly and solely as a reseller, seeking to recover damages on only gasoline bought and resold as a jobber, it did not attempt to establish that its cost of gasoline was increased more than the increase of income resulting from the increase in the whole market structure. Petitioner offered a tabulation of its increased cost (Ex. 165, R. 913, 1301), but failed to produce any computation of increased income.

Petitioner has now set out a schedule of margins on sales to dealers in the appendix to its brief and has referred to certain average margins on Pages 20 and 21 as "the jobber's margin." These margins do not show any damage to petitioner and, furthermore, they are not petitioner's margins (R. 496-497; 667-672). Reference is made by petitioner to the fact that there was a higher average margin for the year 1934 than for the years 1935 and 1936. But, as shown by petitioner's own schedule, the reduction in margins occurred on September 11, 1934 as the result of Standard's action in reducing the service station price 2.2¢. This was several months prior to the commencement of the conspiracy for which respondents were charged with raising prices—not reducing them (Ex. 1, R. 110, 1001; R. 6). Even if petitioner had shown the margins received by it at all of its bulk plants, it, also, would have been

necessary to prove the gallonage sold to jobbers, dealers and consumers.

It would have been a simple matter for petitioner to have ascertained its increased income. It had, as a part of its records, price schedules showing the prices charged on sales from its bulk plants (see Exs. 24, 25, 26, 27 & 28 [R. 376, 1069-1073] offered by respondents); and petitioner also had sales analyses showing the gallonage sold to jobbers, dealers and consumers (R. 920). It failed to produce these price schedules or the sales analyses.

The burden was upon petitioner to prove the fact and cause of injury with certainty. *Story Parchment Company* v. *Paterson Parchment Paper Company, et al.*, 282 U. S. 555, 562 (1931); *Palmer, et al.* v. *Connecticut Railway & Lighting Co.* 311 U. S. 544, 561 (1941); and its failure to produce the evidence in its possession raises a presumption that such evidence would have been adverse to it. *Joseph Galloway by Freda Galloway, his Guardian, Petitioner* v. *The United States of America,* 319 U. S. 372 (1943); *Interstate Circuit, Inc., et al.* v. *United States,* 306 U. S. 208, 226 (1939); *Shuell, et al.* v. *London Amusement Co.,* 123 F. (2d) 302, 306 (C. C. A. 6th, 1941).

B. The Only Reasonable Inference Which Can Be Drawn from the Evidence Is That Petitioner Sustained No Injury.

We have set out in this brief the different increases in the tank car and retail markets during 1935 and 1936 (Brief, p. 5), and it appears that the increases in the tank car market were followed by corresponding increases in the retail market. Furthermore, the Barber Company guaranteed petitioner a gross margin of profit of 5½¢ and subsequently 5¾¢ per gallon, between the tank car price plus freight and the normal service station price as posted by the Standard Oil Company of Indiana less taxes (Ex. 15, R. 243, 560, 563-564).

If petitioner paid an increased amount of $156,000.00 for gasoline as stated by it, it is clear that it received at least this additional amount as the result of the increase in the whole market structure, and undoubtedly it received more as a result of buying and selling on a rising market. Therefore, the only reasonable inference which can be drawn from this evidence is that petitioner did not sustain any injury in its business or property.

IV.

The Claim of Petitioner That Respondents Fixed and Limited Its Margin, and Fixed, Reduced and Limited the Retail Price Is Raised for the First Time in the Supreme Court and Is Without Support in the Pleadings or Evidence.

Petitioner asserts that the contention of respondents and the statements by the Supreme Court in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150 (1940), that the buying and selling prices of the jobber were increased, prove the fact of damage to it. The fact is that just the contrary is established. Comparable increases in both the buying and selling prices of the jobber establish that he received no injury.

Petitioner refers to the margin schedule in the appendix to its brief (which does not represent its margins) to show that the jobber's margins were reduced and did not exceed approximately 2¢ per gallon in 1935 and 1936.[2] Petitioner points out that Standard reduced the retail price on

2. Commencing on September 11, 1934 and continuing through 1935 and 1936 Standard's retail price was determined by computing the tank car market and adding freight, taxes and 5½c. This 5½c was the equivalent of a 2c jobber margin and a 3½c service station margin (R. 160-161, 203-204, 214). *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150, 192.

September 11, 1934, 2.2¢ "cutting the jobber's margin from .03773¢ to .01573¢ per gallon" (Pet's. Brief, p. 19). Petitioner suggests that this was the result of a conspiracy between Standard and respondents, and concludes that respondents have limited the jobber's margin by fixing both the buying and selling prices of the jobber. This point is made for the first time in the Supreme Court and is without support in the pleadings or evidence in the trial court or in the statement of points in the Circuit Court of Appeals. The Government charged in the Madison Oil Case and petitioner alleged in this case that respondents entered into a conspiracy to raise prices (not to reduce them), and that such conspiracy began in February 1935 (not on September 11, 1934) (Ex. 1, R. 110, 1001; R. 6).

Petitioner recognizes that this was not an issue in the trial court by the following statement in its brief:

> "Respondents cannot complain that this theory is not now more specifically set out in the pleadings nor insisted upon in the trial." (Pet's. Brief, p. 21)

Not only was it not set out in the pleadings or insisted upon in the trial, but it was expressly disclaimed by petitioner as being an issue in the case. In a colloquy between counsel reference was made to the action of Standard on September 11, 1934 in reducing retail prices as not being an issue in this lawsuit, and Mr. Crawford, counsel for petitioner, stated:

> "• • • We are not claiming here any damage on account of what the Standard Oil Company did in 1934. I am sure counsel understands that." (R. 256)

V.

Petitioner Cannot Maintain This Action Against Respondents, Because Both Petitioner and Respondents Were Participants in a Broad Stabilization Program to Raise Prices in Petroleum Markets, and Such Stabilization Program Was Found to Be Illegal in United States v. Socony-Vacuum Oil Co., Inc., et al., 310 U. S. 150 (1940).

There was no issue of fact for the jury on this question because it was established in the trial court by undisputed evidence. The necessary and controlling facts to establish this defense appear in the record from the following three sources:

(a) Letters written by A. F. Podvin, Vice President and General Manager of petitioner;

(b) Testimony of officers of the petitioner; and

(c) The judgment in the Madison Oil Case which was offered by the petitioner as *prima facie* evidence under Section 5 of the Clayton Act.

We have heretofore set out briefly the evidence of petitioner's activities in participating in this stabilization program (Brief, pp. 7-9). The record is replete with letters and testimony of petitioner's officers which establish that it was an active agency in working with respondents and others to carry out the stabilization program and to maintain prices during 1934, 1935 and 1936 (R. 463, 488-489, 433-434, 445-446, 457-458; Exs. 67-106, R. 413, 414, 418, 419, 421, 427, 438, 448, 458, 466, 474, 412-481; Exs. 107-142, R. 484, 577, 578, 589, 485-486, 1218-1248).

The Circuit Court of Appeals has found as a fact that petitioner participated in the illegal conspiracy and was in *pari delicto* with respondents (R. 1355, 1358). As this finding has not been brought forward by any question in the petition for writ of certiorari, this Court, of course,

must assume such finding to be correct, *Rule 38, Supreme Court Rules.*

It is firmly established that a court will not aid a party to recover on a cause of action that is founded on a wrong in which the party took part. *Harriman* v. *Northern Securities Company,* 197 U. S. 244, 298 (1905). This is a well settled rule in treble damage actions under the anti-trust laws. *Eastman Kodak Co.* v. *Blackmore,* 277 F. 694 (C. C. A. 2d, 1921); *Victor Talking Mach. Co.* v. *Kemeny,* 271 F. 810, 816 (C. C. A. 3rd, 1921); *Bluefields S. S. Co., Limited* v. *United Fruit Co.,* 243 F. 1, 13-14, 18-19 (C. C. A. 3rd, 1917); *Maltz* v. *Sax, et al.,* 134 F. (2d) 2, 5 (C. C. A. 7th, 1943).

WHEREFORE, the petition for writ of certiorari should be denied.

DAVID T. SEARLS,
VINSON, ELKINS, WEEMS & FRANCIS,
Esperson Building,
Houston, Texas,
LEON E. ISAKSEN,
H. H. THOMAS,
THOMAS, ORR & ISAKSEN,
122 West Washington Avenue,
Madison, Wisconsin,
WILLIAM H. DOUGHERTY,
STANLEY M. RYAN,
NOLAN, DOUGHERTY, GRUBB & RYAN,
401 Jackman Building,
Janesville, Wisconsin,
J. H. MARSHUTZ,
FISH, MARSHUTZ & HOFFMAN,
1115 Wells Building,
Milwaukee, Wisconsin,
STURTEVANT HINMAN,
135 South La Salle Street,
Chicago, Illinois,
Attorneys for Respondents,
Socony-Vacuum Oil Company, Inc.,
Continental Oil Company,
The Pure Oil Company,
Shell Oil Company, Inc.,
Sinclair Refining Company,
Mid-Continent Petroleum Corporation,
Phillips Petroleum Company.